IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT.

Kedar Lal & ors. vs. LRs. of Ram Dayal

S.B. Civil Second Appeal No. 298/94 against the judgment and decree dated 4.6.1994 passed by the learned Addl. District Judge No.2, Jodhpur in Civil Decree Appeal No. 95/94

Date of Judgment: April 27, 2007.

PRESENT
HON'BLE MR. PRAKASH TATIA,J.

Ms. K.C. Samdaria for the appellants.
Mr. S.C. Maloo for the respondents.

BY THE COURT:

REPORTABLE

This appeal is by the landlord against the dismissal of his suit by the trial court in Civil Original Suit No.91/86 dated 14.12.1992 and which was upheld by the first appellate court in Civil Appeal Decree No.95/94.

Brief facts of the case are that the plaintiffs-landlords filed the suit for eviction of their tenant deceased Ram Dayal on 19.3.1974. The plaintiffs sought eviction of the tenant on the ground of their personal bona fide need. During pendency of the suit, the plaintiffs submitted an application under Order 6 Rule 17 C.P.C. in the trial court on 14.1.1986 and submitted that before few years, the defendant has materially altered the suit premises and that fact came to the knowledge of the

plaintiffs only on 29.12.1985, therefore, the plaintiffs want to incorporate another ground for eviction of the tenant and that is material alteration in the suit premises. The amendment was allowed by the trial court and the amended plaint was filed. The suit for eviction of the plaintiffs against the defendant, therefore, was on the ground of personal bona fide necessity of the plaintiffs and on the ground of material alteration in the suit premises by the tenant.

The tenant-defendant filed the written statement as well as counter claim. In the written statement, the tenant-defendant denied any material alteration and submitted that the suit premises was taken on rent in the Samvat Year 1997,i.e. about the year 1940. The suit premises was taken on rent by the defendant's father on rent of Rs.15/- per month only and for that a rent deed was also executed by defendant's father in favour of the plaintiffs. The defendant submitted that the plaintiffs got the rent of the suit premises increased in violation to the provisions of by the Rajasthan Premises (Control of Rent and Eviction) Act, 1950. The defendant, therefore, prayed that the standard rent of the suit premises may be fixed @ 37.50. As per the provision as was in force on the date when defendant submitted counter claim for fixation of standard rent the basic rent was as it was on 1.1.1943 and maximum rent could have been 2-1/2 times of that basis rent.

The Rajasthan Premises (Control of Rent and Eviction) Act, 1950

was amended in the year 1975 and certain amendments were made on the basis of which the landlords also could have sought fixation of standard rent so as to increase the rent of the suit premises. The plaintiffs, therefore, filed a separate suit for fixation of standard rent to take benefit because of the amendment of law in the Act of 1950. Under this amended law, the basic rent is the rent of the premises which was as on 1.1.1962, therefore, could have been increased by 2-1/2 times to said basic rent. The plaintiffs' subsequently filed suit was consolidated with the present suit. The trial proceeded and the plaintiffs' suit so far as eviction of the tenant on both the grounds, the personal bona fide necessity and material alteration in the suit premises, was dismissed by the trial court vide judgment and decree dated 14.12.1992. The trial court decreed the suit of the plaintiffs so far as fixation of standard rent is concerned and thereby declared the standard rent of the suit premises to be Rs.100/- per month from 1.6.1978.

The plaintiffs preferred regular first appeal against the judgment and decree of the trial court dated 14.12.1992. In said regular first appeal, the defendant submitted cross-objection against the increase of rent. the first appellate court by judgment and decree dated 4.6.1994 upheld the finding of the trial court on issue of personal bona fide necessity and material alteration and thereby the plaintiffs' suit

remained dismissed so far as eviction of the tenant is concerned. However, the first appellate court allowed the cross-objection filed by the defendant and set aside the increase of rent made by the trial court and the first appellate court declared the standard rent of the suit premises with effect from 8.7.1975 to be Rs.37.50 per month. Being aggrieved against the judgment and decree of the first appellate court dated 4.6.1994, this second appeal has been preferred by the landlords.

Following substantial questions of law were framed by this Court while admitting the appeal on 28.11.1994:-

> *"1. Whether the finding on the question of material alteration effected in the property by the tenant are based on mis-reading and non-reading of material evidence.*
>
> *2. Whether the lower appellate court erred in not going into the question of fixing of standard rent prayed for by the landlord in view of the fact the application of the landlord fixing of standard rent was after the incorporation of amendment in the Act."*

It will be worthwhile to mentioned at this juncture that during pendency of the second appeal, the sole respondent-defendant Ram Dayal died on 18.11.1996.The appellant submitted an application under Order 22 Rule 4, C.P.C. before this Court on 16.1.1997. In this application, the appellant submitted that right to sue survives to the appellant against the legal representatives of the deceased tenant. Said

application was allowed by this Court and all the heirs of deceased tenant Ram Dayal were taken on record as legal representatives in this second appeal. On 29.1.2001, an application was submitted by the appellants stating therein that in the life time of deceased-tenant Ram Dayal, he alone was doing the business in the shop and his wife was living with him in the upper portion of the suit premises, therefore, according to the appellants, only the wife of the deceased-tenant could have been made party in the appeal. This application was submitted because of the reason that notices of this appeal were not served upon one of the married daughters of the deceased-tenant and, therefore, after mentioning above fact, it was prayed that the name of daughter of deceased-tenant may be deleted. Said application was allowed by this Court by order dated 19.2.2001 and name of respondent Ram Bhanwari was deleted. But no order was sought and passed on the plea which was taken by the appellants that only wife of deceased-tenant should have been impleaded as party in the appeal as legal representative of deceased Ram Dayal. It will be worthwhile to mention here that there is one application under Order 5 Rule 17, C.P.C. by the appellants wherein it has been stated that one of the sons of deceased tenant namely Purushottam and his wife Smt. Radha Devi are residing with Smt.Radha Devi and he, after reading the notice, did not accept the notice of the appeal and even did not allow the process server to affix the notice,

therefore, the service of notice upon said Smt. Radha Devi and Purushottam may be treated as sufficient. On 1.8.2003, an application was submitted by the appellants stating therein that the trial court passed the decree and determined the standard rent of the suit premises @ Rs.100/- per month with effect from 1.6.1978. In pursuance of the said decree, the tenant should have deposited the difference amount of the rent in the court. It is also submitted that since the order of the appellate court was stayed by this Court in this second appeal by order dated 7.11.2001, therefore, the tenant-respondent should have deposited the rent @ Rs.100/- per month at least from 7.11.2001. It is submitted that since the defendant has not deposited the rent, therefore, he is liable to be evicted on this ground. In this application, the appellant submitted that the plaintiff's son Purushottam is doing separate business in adjacent shop and the defendant himself in his statement, admitted that his son Purushottam is doing separate business and has nothing to do with the business of the defendant-tenant. It is also submitted that defendant's another son Ram Chandra is serving in medical company of veterinary medicines and other son Sushil is also serving in the Rajasthan Bank and as such, none of the family member of the defendant Ram Dayal was doing business in the life time of the deceased-tenant and, therefore, none of the heir of deceased Ram Dayal is tenant as defined under Section 3(vii) of the Rajasthan Premises

(Control of Rent and Eviction) Act, 1950.

The respondent submitted detail reply to the application of the appellant dated 1.8.2003 and stated that the respondent is continuously depositing the rent and also stated that the interim order passed by this Court staying the order of the first appellate court by which the rent stands reduced, is of no relevance so far as the present appeal is concerned. For other allegation, the respondent's legal representatives submitted that in the life time of deceased Ram Dayal, his wife Radha Devi was also helping him regularly in the business and after the death of her husband, she was continuously doing the same business. It is also submitted that her grand-sons Mahesh and Virendra were also helping Smt. Radha Devi who was helping to Ram Dayal also in the life time of Ram Dayal. It is also submitted that apart from above, the sons of deceased Ram Dayal were also helping in business of deceased-tenant in his life time and thereafter they were also actively helping in the business of their mother, that is the wife of deceased Ram Dayal.

The above facts narrated in detail are relevant because of the reason that the appellants are seeking decree of eviction of the respondents from the suit premises on the ground that none of legal representative of deceased Ram Dayal was doing business in the suit premises during life time and up to the time of death of Ram Dayal and even if it is admitted that Smt. Radha Devi was doing the business in

the suit premises from the time of Ram Dayal then said Radha Devi also died. It is also submitted by the learned counsel for the appellants that after the death of Smt. Radha Devi, none of the legal heir of deceased Ram Dayal and Smt. Radha Devi are doing any business in the suit premises. It is also submitted that the grand-sons are not heirs and, therefore, in view of the judgment of this Court delivered in the case of L.R. Of Mishrimal vs. L.Rs. Of Sukh Lal & ors. (2006(2) DNJ 1117) and Dwarkadass v. Narayan Dass (2007(1) RLW 446), the persons may they be family members of the tenant and were carrying on business with the tenant in his life time and continued with business till the death of the tenant even then they are neither tenants as defined under Section 3 (vii) of the Act of 1950, nor they can claim any protection under the Act of 1950. The learned counsel for the appellants also relied upon earlier judgment of this Court delivered in the case of Shyam Lal vs. Hira Lal (1987 RLW 621) as well as in support of his contention that the business in the life time of deceased alone is not sufficient but it should be continued till the time of death of deceased-tenant by the legal heir, the learned counsel for the appellants relied upon the judgment of this Court delivered in the case of Chiman Lal and anr. vs. Narendra Kumar (1995(2) RLW 415 and Smt. Usha and anr. vs. Sukhsampat Mal (1995(2) RLW 14).

On merits, the learned counsel for the appellants submitted that

both the courts below misread the statement of the defendant as well as ignored the important admission of the defendant and by that, wrongly deiced issue of material alteration against the plaintiffs. It is submitted that the defendant, in his statement, very clearly admitted that he put the girder in the shop during pendency of the suit. The learned counsel for the appellants further vehemently submitted that in view of the fact that lot many changes were made by the defendant-tenant in the suit premises then on that ground, the two courts below should have granted decree of eviction against the tenant-defendant. It is also submitted that in view of the judgment of this Court delivered in the case of Gurudev Singh & ors. vs. Mohammed Abdul Razak (2003(3) RLR 90) coupled with the fact that it is the defendant-tenant admitted that he who put the girder in the shop then the case of material alteration stands proved. This Court in the above case, upheld the concurrent finding of fact recorded by the two courts below and held that the finding of the two courts below about material alteration by putting girder in the basement was legally right.

The learned counsel for the respondents submitted that the appellants have raised absolutely new question of fact before this Court and is seeking the decree for eviction against the legal heirs of the tenants on the grounds that they are not protected by the provisions of the Rent Control Act, that is the Act of 1950. It is also submitted that

the defendant Ram Dayal was doing the business of sweet and his wife was also helping Ram Dayal in his life time and she was continuing the business. Ram Dayal's sons as well as grand-sons were also helping Ram Dayal in doing business and till today they are doing the same business. It is also submitted by the learned counsel for the respondents that the premises in question is one and had composite use, i.e., it was let out for residential as well as for commercial purpose and this fact is admitted fact. The tenant with his family members was and is residing in the upper portion of the shop and was doing business in the lower portion of the rented premises in the shop. It is admitted case of the appellant-landlords that the deceased was residing in the same premises with his family and even during pendency of this appeal, the appellants admitted that son Purushottam is residing in the same premises with his mother after the death of Ram Dayal. Therefore, very foundation for claiming any relief is missing so far as this fact is concerned. It is also submitted that otherwise also, the appellants themselves impleaded the legal representatives of Ram Dayal as party in the present suit and they cannot now say that the plaintiff's right to sue did not survive against the legal representative of Ram Dayal. The learned counsel for the appellant at this juncture, pointed out that mere impleading legal representatives of the tenant as party in suit or appeal, is of no consequences because of the simple reason that even if the tenant

leaves behind heirs as well as legal representatives but if they were not residing with the tenant in the life time of tenant in residential premises and if they were not carrying on business with the deceased-tenant in his life time and upto his death, then they are not tenants despite the fact that they are legal representatives of deceased-tenant.

The learned counsel for the respondents further pointed out that in fact the finding of fact recorded by the two courts below is based upon the view taken by this Court in several judgments and, therefore, even if there is possibility of taking second view after appreciation of evidence, then neither re-appreciation of evidence is permissible in second appeal nor there is any reason to set aside the judgment and decree of the trial court on the question of fact.

The learned counsel for the respondents submitted that the law on question of material alteration is very clear and basically the Hon'ble Supreme Court in the judgment of Om Prakash vs. Amar Singh and anr. (AIR 1987 SC 617) clearly laid down the parameters which may not amount to material alteration in the suit premises. In support of his plea, the learned counsel for the respondents relied upon the judgment of this Court reported in the case of Smt. Supyar Bai vs. Smt. Gordhan Bai through her Legal Representatives (1992(1) WLC 590) as well as judgment of this Court (by me) delivered in S.B.Civil Second Appeal No.323/89-LRs. of Bal Krishna vs. Mohan Singh decided on 1.5.2003 and

the judgment delivered in the case of M/s Kistur Chand Jawari Lal vs. Mangi Lal(1990(2) RLR 534).

So far as standard rent is concerned, the learned counsel for the respondents submitted that the respondents submitted counter claim when the old law was in force and, therefore, he had right to get the relief in accordance with the provisions of old law as his right crystallized on the date when he filed the counter claim and, therefore, his claim for getting the standard rent determined under the law which was in force at relevant time is not affected by the subsequent amendment made in the Act of 1950, in the year 1975. For this learned counsel for the respondents relied upon the judgment of the Hon'ble Supreme Court delivered in the case of Raminder Singh Sethi v. D. Vijayarangam (AIR 2002 SC 2087) and the judgment of this Court delivered in the case of Jamandass v. Gokuldass (1983 RLW 565). The learned counsel for the respondents also submitted that the first appellate court rightly determined the rent of the suit premises @ Rs.37.50/-

I considered the submissions of learned counsel for both the parties and perused the record also.

The first question which goes to the root of the matter is whether the legal representatives of deceased Ram Dayal are tenants as defined in Section 3(vii) of the Act of 1950. This plea has been revised by the

landlord because the original tenant died during pendency of this second appeal. The plea raised is dependent upon the fact. Clause (vii) of Section 3 of the Act of 1950 provides that the person by whom or on whose behalf rent is payable to his landlord and the person who continued in possession of the rented premises,after the termination of his tenancy otherwise than by a decree for eviction passed under the provisions of this Act, is a tenant. However, in the event of death of said tenant, as referred in sub-clause (a) of clause (vii) of Section 3, when the premises is residential then such tenant's surviving spouse, son, daughter and other heir in accordance with the personal law applicable to him, becomes the tenant but for this also there is further condition that if the premises is residential then the said persons should have resided with the deceased tenant during his life time and continued so up to his death. For commercial premises, the only said person is tenant who was carrying on business with the deceased tenant during his life time and continued as such up to the time of tenant's death. Therefore, the questions of facts for deciding this issue are that whether the deceased tenant Ram Dayal had spouse, son, daughter or any other heir who are heirs in accordance with the personal law, were residing in the upper floor of the suit premises (because that was a residential accommodation) and they continued to reside with him till the time of death of the deceased-tenant. For commercial premises, (that is the

shop below the residential accommodation).

Whether said person was carrying on business with tenant and continued as such till the death of the tenant ? It has been contended by the learned counsel for the appellants that the deceased Ram Dayal himself in his statement, clearly admitted that his one son is running his separate shop near the shop in dispute and other two sons of the deceased tenant were in service. The defendant-deceased tenant Ram Dayal in his statement nowhere stated that any of his legal heir was carrying on business with him in the premises in dispute as member of his family, therefore, their does not arise any question of doing any business by any of the family members of the deceased-tenant with the tenant during his life time or at the time of tenant's death. The learned counsel for the appellants vehemently submitted that since the legal heirs are seeking protection under the Act of 1950, therefore, they should have pleaded and should have disclosed the complete facts for claiming the benefit under the Act of 1950 and for that purpose, the burden was upon the tenants to prove that they still fall in the category of tenants covered under sub-clause (b) of clause (vii) of Section 7 of the Act of 1950. The learned counsel for the landlord-appellants relied upon the admission of the legal representatives of the tenant made in reply to the application of the appellants dated 1.8.2003. The reply was filed by the respondents legal representatives of deceased tenant

wherein it is stated that the defendant-deceased-tenant's wife Smt. Radha Devi was also doing and helping in the business of deceased tenant in the life time of the tenant her husband and her two grand sons Mahesh and Virendra also were helping the deceased-tenant in the business during the life time of the deceased tenant. The learned counsel for the appellants submitted that in view of the judgment of this Court delivered in the case of L.R. of Mishrimal vs. L.Rs. of Sukh Lal & ors. (2006(2) DNJ 1117) and earlier judgment of this Court delivered in the case of Shyam Lal vs. Hira Lal (1987 RLW 621), the grand-sons are not tenants, as they are not heirs of deceased tenant Ram Dayal in the life time of Ram Dayal's sons as per Schedule 1 of the Hindu Succession Act 1955. So far as this plea that Ram Dayal's grand sons cannot be tenants in view of the above judgments, that will not detain this Court for long because of the reason that in reply to application of the appellants-landlord, the legal representatives of tenant submitted that the deceased tenant's wife as well as deceased tenant's sons after their service time, used to help the deceased tenant in carrying on business in the suit property. Therefore, even if the working of grand sons of Ram Dayal in the suit premises is ignored and they may be held not to be tenants in the suit premises then plea of the legal heirs of deceased tenant Ram Dayal that they were carrying on business with deceased Ram Dayal survives. Since the appellant is relying upon the said

admission of the tenants legal representatives then that admission does not prove that no heir, particularly the wife and sons of deceased tenant were not working with tenant in the shop in dispute, rather their stand is that they were doing the business with the tenant.

At this place, it will be worthwhile to mention here that since cause accrued to the appellant during pendency of the appeal for getting any order of eviction if is permissible under the law then that accrued to the appellants during the pendency of the second appeal only and the appellants themselves after the death of tenant Ram Dayal submitted application under Order 22 Rule 4 C.P.C. on 16.1.1997 and did not choose to raise this ground that the heirs of deceased Ram Dayal were not residing with him in the part of the premises and were not carrying on business with him. Instead of submitting so, the appellants submitted that right to sue survives against the legal representative of deceased tenant and, therefore, they all be impleaded as party in the present second appeal. The appellants at this time, could have raised the ground which could have given an opportunity to the legal representatives of tenant to contest the issue upon which enquiry could have been held to determine the issue. On this application, therefore, no enquiry could have been held under Order 22 Rule 5,C.P.C. to find out whether rights of tenant which were available to original tenant under the Act of 1950 devolved upon heirs of the tenant ?

At this juncture, it will be further worthwhile to mention here that as per the definition of "Legal Representative" given in sub-section (11) of Section 2 ,C.PC., it is not necessary that the legal representatives must be heir only. The definition of legal representative is entirely different than the definition of heir in accordance with the personal law. All the persons who in law, can represent the estate of deceased persons and the persons who intermeddles estate of the deceased then those persons are the legal representatives of the deceased in the suit. Sub-Section (11) of Section 2 nowhere provides that a heir only can be legal representative or heir dealing with the property or heir representing the estate of the deceased persons alone will be the legal representative. In view of the above reasons, the appellants could have very conveniently submitted that none of the legal representative of Ram Dayal represents the estate of the deceased-tenant Ram Dayal nor any of the heirs ever intermeddles with the estate of the deceased, therefore, none of the heir of deceased-tenant Ram Dayal was legal representative then in that situation, it was for the plaintiffs to plead and he should have given opportunity to heir of deceased tenant to contest the issue so that the matter could have been enquired under Rule 5 of Order 22, C.P.C.

The learned counsel for the appellants also submitted that mere impleading the heirs of the deceased-tenant as party respondents after

the death of the deceased tenant then by that itself, the tenant cannot get the protection under the Act of 1950. So far as this contention is concerned, certainly the learned counsel for the appellants rightly contended so. But the question here is that how this issue could have been decided. For that the learned counsel for the appellants submitted that it was the burden of the tenant to plead and prove their right to protection under the Act of 1950, whereas the learned counsel for the respondents submitted that since the plaintiff is seeking decree or order in his favour on the basis of question of fact that the plaintiff is entitled to decree or order in his favour because the heirs of the tenant are not protected by the provisions of the Act of 1950 then unless there is a allegation that the legal heirs are not protected by the Act of 1950 they cannot assume that the plaintiffs are seeking relief of eviction of the heirs of the deceased on said ground.

It is settled law that in civil proceeding, a persons who alleged, he must prove. It is also settled law that unless there is a claim founded upon facts and on the basis of legal right then that fact or ground is required to be pleaded first, so that other party may come to know why relief has been sought against him. Therefore, such issue can be raised only by the plaintiffs then only the defendants can rebut it or even accept the fact and ground. After admitting the present respondents' right to be substituted in place of deceased tenant on application of the

appellants themselves, the appellants all of sudden cannot take a ground which they have not pleaded even in the application for substitution of party.

Not only this that the appellants themselves impleaded the respondents, the legal representatives of the deceased tenant as party without pleading that they are not protected under the Act of 1950 but subsequent to said application dated 16.1.1997, the appellant submitted another application dated 29.1.2001 wherein the appellants specifically admitted that the wife of the deceased-tenant alone is tenant as per clause (vii) of Section 3 of the Act of 1950. After this admission, the appellants estopped from submitting that deceased-tenant Ram Dayal's wife Smt. Radha Bai was not tenant in the suit premises.

Apart from above, it is admitted case that the suit premises was let out for composite use, that is for residential as well as for commercial use and the tenancy is one and, therefore, the suit premises is neither wholly commercial nor wholly residential. Sub-clause (b) of clause (vii) of Section 3 of the Act of 1950 defines the tenant for premises which is exclusively residential and which is exclusively commercial. The tenancy cannot be bifurcated without the consent of both the contracting parties or without by the order of the court. Neither in the Act of 1950 nor in the Transfer of Property Act, it has been provided that there cannot be composite tenancy, that for mixed

purposes as in the present case, it is one tenancy having both properties, i.e., for residence and for commercial purpose. The tenancy cannot be bifurcated against the wish of any of the contracting party. The tenancy can also be divided by the order of the court which can be done under certain circumstances and particularly when the Rent Control Act applies then by passing the decree of partial eviction of tenant under Section 14(2) of the Act of 1950. Then in that situation, the appellants themselves in their one more application, though submitted for other purpose, which is dated 1.3.2001, admitted that deceased tenant Ram Dayal's wife Smt. Radha Devi as well as Purushottam both are residing in the suit premises, that is on the upper portion of the building, that is above the shop in dispute which is part of the same tenancy with the upper residential portion, therefore, in fact, it is admitted case of the appellants at least till 1.3.2001 that Smt.Radha Devi and Purushottam both were residing in the property in dispute with Ram Dayal deceased-tenant during his life time and continued to live in the same premises, not only up to the death of Ram Dayal but even thereafter. It is also not the case of the appellants thereafter that thereafter respondent Smt.Radha Devi and Purushottam left the premises and that was not so because of the reason that that fact is not at all relevant because the legal representatives becomes tenant with the death of tenant on fulfilling the condition of sub-clause

(b) of clause (vii) of Section 3 of the Act of 1950. They continued to be tenant till decree for their eviction is passed under the Act of 1950.

Be it as it may be, the plea raised by the appellant is not sustainable because of the reason that firstly, the plea was not raised by the appellants when they moved application for bringing on record the legal representatives of deceased-tenant, then secondly, the appellants themselves admitted that the family members of deceased tenant were residing with the deceased-tenant in the suit premises along with the deceased-tenant till time of his death and continued even thereafter and thirdly because of the reason that the question of fact which sought to be raised subsequent to admissions made by the appellants, is a disputed question of fact and for which the respondents have disclosed that how the suit premises continued to be in occupation of the family members of the deceased tenant from the life time of deceased tenant to the time of death of tenant Ram Dayal for both purposes, namely, for residential as well as for commercial purposes.

In view of the above reasons and the facts of the present case, the appellants cannot get the decree for eviction on this ground. Since because of above reason itself, this Court is of the view that the decree cannot be granted to the landlords on this ground, therefore, this Court leaves open the issue whether decree for eviction can be granted merely on the basis that none of the legal representatives of the tenants

have protection under the Act of 1950 in a situation when the plaintiffs failed to prove any ground of eviction of the tenant under the provisions of Section 13 of the Act of 1950 or under the provisions of the Transfer of Property Act.

The learned counsel for the appellants vehemently submitted that the defendant Ram Dayal materially altered the suit premises. The learned counsel for the appellants tried to submit that the finding of fact recoded by the two courts below is because of misreading and non-reading of material evidence and, therefore, the learned counsel for the appellants referred the statement of the defendant himself who in his cross-examination, at one place, admitted that he put girder in the shop during the pendency of the suit. It is true that the defendant said so in his statement but that statement has been read out of context. The defendant stated that the premises was taken on rent in the year 1940 and that too by defendant's father. The roof of shop was wooden and after passing of so many decades, the roof became weak and, therefore, initially the defendant gave some support to the falling roof. During the pendency of the suit, the defendant tenant found that that support also became weak, therefore, he placed a girder only to support the falling wooden roof. The defendant-tenant even did not change the roof, is the statement of the defendant and not controverted by the plaintiffs. The other allegations against the defendant are that he removed one

small wall of stone slab so as to make out *Chabutari* open so that there may not be any obstruction between *Chabutari* and the rented premises. There is allegation that some stone-slabs were put by the defendant-tenant. The two courts below carefully considered all the alleged material alteration and at this juncture it will be worthwhile to mention here that the plaintiffs filed the suit for eviction of the tenant in the year 1974 and sought amendment in the written statement to incorporate the ground of material alteration in the year 1985 and in that application, stated that a few years ago such alteration were made. The two courts below found that the alteration made are not of material nature. Though both the learned counsel relied upon several judgments referred above in support of their contentions that in what situation there is a material alteration in the suit premises, but from the above judgments, it is clear that what is material alteration in the suit premises, is dependent upon the totality of the facts of the case and isolated facts read out of context from the facts of other case, cannot make the decision on the facts of the given case. It is true that in some cases, some acts of the tenant were found to be condemnable as material alteration in the suit premises and some were not found material alteration in other case and that is because of the reason that the facts of the case make them separate. Basically, the question of material alteration is a question of fact and unless it is vitiated by

misreading of the evidence or by ignoring material evidence on record or is because of the consideration of absolutely irrelevant evidence then only, that finding of fact can be interfered in second appeal. In the present case, the two courts below, as stated above, looked into all the evidence and appreciated the facts in correct perspective, therefore, the substantial question of law no.1 is decided against the appellant and the finding of the two courts below is upheld on the issue of material alteration.

Another question is that whether the first appellate court committed error of law by allowing the cross-objection filed by the tenant and reducing the standard rent of the suit premises. At this juncture we may recapitulate the facts again so far as the claim of enhancement and reduction of the rent is concerned. The plaintiffs filed the suit for eviction of the tenants alleging that the premises was let out on rent on 10.12.1965 and at that time rent was Rs.15/- per month. The defendant, thereafter, increased the rent to Rs.60/- from Samvat Year 2029, therefore, last paid rent was Rs.60/- when the suit was filed by the plaintiffs. The suit was not on the basis of default in payment of rent as at that time the defendant did not commit any default in payment of the rent. The defendant submitted counter claim and alleged that the suit premises was taken on rent in the year 1940 and on 1.1.1943 the rent of the suit premises was Rs.15/- only. The plaintiffs

got the rent increased illegally and enhanced it up to Rs.60/-. The defendant, therefore, prayed that the standard rent may be fixed for the suit premises. This counter claim was submitted by the defendant on 8.7.1975. The relevant section for fixation of standard rent in the Act of 1950 is Section 6 and when the counter claim was filed, the maximum rent of a commercial premises could have been 2-1/2 times to the rent as which was on 1.1.1943. Therefore, according to the defendant, his counter claim was governed by the said provisions of law. The Section 6 was amended with effect from 29.9.1975. By this amendment, the maximum rent or the standard rent can be 2-1/2 times to the rent as it was on 1.1.1962 after amendment of Section 6 in the year 1975. The plaintiffs filed the suit for fixation of standard rent claiming that on1.1.1965, the rent was Rs.40/- and, therefore, that may be increased to Rs.100/-. The trial court consolidated the suit of the plaintiffs filed for fixation of standard rent with the suit for eviction wherein the counter claim of the defendant-tenant was there for fixation of standard rent as per the original provision under Section 6 of the Act of 1950. The trial court declared the standard rent of the suit premises to be Rs.100/- per month with effect from 1.6.1978. The trial court dismissed the counter claim filed by the defendant in view of the decree passed in plaintiffs' suit for fixation of standard rent. The first appellate court allowed the cross-objection of the defendant-tenant on the

ground that since amendment in Section 6 came into force from 29.9.1975, therefore, that amended provision cannot effect the right of the defendant-tenant to get the standard rent declared in his counter claim which was submitted prior to the coming into force of the amendment dated 29.9.1975. The first appellate court, therefore, declared the standard rent of the suit premises as Rs.37.50/- per month from 8.7.1975

The learned counsel for the respondents relied upon the judgments delivered in the case of Raminder Singh Sethi (supra) wherein it has been held that rights of parties to litigation stand crystalised on the date of commencement of lis. Said judgment was delivered in the matter of Rent Control Act itself tough of Karnataka Rent Control Act. The Hon'ble Apex court held that new Rent Act is not given retrospective effect and, therefore, also the amended provisions cannot be applied to the pending litigation. Yet another judgment of the Division Bench of this Court relied upon by the learned counsel for the respondents is delivered in the case of Jamnadass (supra), wherein the Division Bench of this Court clearly held that amendment under Section 6 of the Rent Control Act by amendment of 1975 is not retrospective and, therefore, cannot be applied to the suit and proceedings pending on the date when the Ordinance came into force. Therefore, so far as counter claim of the respondent is concerned, in view of the Division Bench judgment

delivered after interpreting the effect of the amendment in the Section 6 of the Act of 1950, by the amendment of the Act of 1975, the counter claim of the defendant-tenant was rightly held to be governed by the provisions which were in force before the amendment of the Section 6 of the Act of 1950.

The dispute cannot come to an end merely because of the above finding on question of law. The reason is that the plaintiffs filed the suit for fixation of standard rent and that was filed after amendment dated 29.9.1975 in Section 6 of the Act of 1950, therefore, the suit of the plaintiffs for fixation of standard rent is governed by the amended provisions of Section 6, which entitles the plaintiff to get the standard rent determined on the basis of the rent as it was on 1.1.1962 and further entitles the plaintiffs to get the standard rent thereafter to the extent of 2-1/2 times to the rent as which was on 1.1.1962. Therefore, there is a serious conflict as the defendant had a right to get the standard rent fixed as per the provisions which were before 29.9.1975 and against this, the plaintiffs have right to get determined the standard rent as per the amended provisions of Section 6 as amended with effect from 29.9.1975. There is a proviso under sub-section (2) of Section 6 of the Act of 1950 which is relevant in this situation which reads as under:-

> "Provided further that where the fair rent or standard rent of any premises has been determined or

> redetermined by any Court under this Act or by any authority under any law or order repealed by Sec. 30 before the commencement of the Rajasthan Premises (Control of Rent and Eviction Amendment) Ordinance 1975 and the amount of such fair rent or standard rent is the same as would be determinable as standard rent by the Court under this Section, the fair rent or standard rent previously determined or redetermined, shall not be disturbed."

By this proviso it has been provided that in case the fair rent or standard rent for any premises has been determined or redetermined under the provision which was repealed by the Section 30 of the Act of 1950 then the amount of such fair rent or standard rent as determined under the repealed Act, shall be same as would be determinable by the court under this Section 6 of the Act of 1950. Though second proviso appears to be not properly worded because it says that amount of fair rent or standard rent as determined under the repealed Act if is the same as would be determinable as standard rent under the Act of 1950, then the said previously determined or redetermined rent shall not be disturbed. If the fair rent or the standard rent under the old repealed Act is the same as would be determinable in new Act then that by virtue of that fact only, cannot disturb the previously determined rent, then in that situation, the entire proviso becomes meaningless. Be it as it may be, in the present case, the rent has not been determined by court

under any of the enactment referred in Section 30 on any earlier occasion and, therefore, the defendant's counter claim itself was under the Act of 1950 itself for getting fixation of standard rent and there is amendment in the same provisions of the Act of 1950, making beneficial to the landlord in the matter of increase of rent. The harmonious construction of two circumstances that is applicability of the old provisions in the case of counter claim of defendant and applicability of the amended provisions of law, in the case of plaintiffs, the standard rent determined on counter claim of the defendant can continue to operate till 29.9.1975 because of the reason that even if the rent in accordance with the unamended Section 6 is determined in counter claim of the defendant then the plaintiffs cannot be denied the right to get fixation of standard rent under the amended Section 6 of the Act of 1950. Therefore, in case the defendant's counter claim stands allowed then that standard rent can continue up to the date of the filing of the suit by the plaintiffs for fixation of standard rent under the amended Section 6 of the Act of 1950.

Further subsequent development is that sub-section (2) of Section 6 of the Act of 1950 has been declared ultra vires by the Division Bench of this Court in the case of Khem Chand vs. State of Rajasthan and another (1999 (2) RLW Raj. 908). This judgment is dated 30.3.1979.The learned counsel for the appellants further submitted that firstly the

standard rent is required to be determined in accordance with the claim submitted by the plaintiffs in their suit but at that time, in view of the sub-section (2) of Section 6 of the Act of 1950, the plaintiffs could not have claimed actual rent of the premises which the plaintiffs could have got if there was no restriction as provided under sub-section (2) of Section 6 of the Act of 1950. It is submitted that when sub-section (2) of Section 6 has been declared ultra vires by the Division Bench of this Court in several cases, granted the order enhancing the rent above the limit of 2-1/2 times of the rent to the rent of 1.1.1962. Therefore, the learned counsel for the appellants submitted that the suit premises which was let out in the year near about 1940 on rent of Rs.15/- per month,was getting rent of Rs.50/- per month in the year 1962, the rent can be increased by the court by taking into account the fact that from 1940 and even from 1962, the value of the properties, cost of construction as well as amenities of living expenses have increased multi-folds. The learned counsel for the appellants submitted that of this Court in the judgment delivered in the case of Brij Mohan & anr. vs. Bhanwari Devi & ors. (2006(3) RLR 108), held that the price index gets doubled, in every eight years and, therefore, in that case the rent was also increased by adopting the same mode of making rent double after eight years. In view of the above, the learned counsel for the appellants submitted that the first appellate court firstly committed

error of law in fixing the standard rent @ Rs. 37.50/- per month with effect from 8.7.1975 and in view of the change in law, the rent may be appropriately enhanced, despite the fact that because of the disability of the appellants in claiming the rent more than 2-1/2 times from the rent which was on 1.1.1962, the Court may fix reasonable rent in accordance with the view taken by this court in the case of Brij Mohan's case (supra).

The learned counsel for the respondents submitted that the rent once fixed on the basis of the claim of the respondent-tenant, should not be interfered on the basis of the subsequent event only as the condition of the shop itself makes it clear that the shop was let out in the year 1940 by wooden roof which required support time to time and a small business of the defendant is in the shop.

The question of fixation of standard rent, as held above, on the counter claim of the defendant and in the facts of the case, was rightly declared to Rs.37.50/- per month from 1.7.1975, but in view of the reasons given above, this rent can continue till the rent is increased by order of the Court under Section 6 of the Act of 1950 and for which the plaintiffs already filed the suit for fixation of standard rent on 23.5.1978.The standard rent of the suit premises, therefore, shall be Rs.37.50 per month from 8.7.1975 to 23.5.1978.

It is true that the plaintiffs has claimed increased rent of Rs.

100/- per month but that was because of the bar created by law and we can take help of the decision of the judgment of Brij Mohan's case (supra) and the Court can take judicial notice of the fact that that increase in rent throughout the country and for that we can take help of reasons given by the various courts when the restriction against the increase of rent was challenged and in that situation, the some of the laws were not found to be valid because of passing of time. Therefore, keeping in mind the condition of the shop in dispute, it will be appropriate to work out the rent that as can be the rent if the rent is doubled after every eight years from the year 1962. Since the trial court held the standard rent of the suit premises to be Rs.37.50 from 1.1.1975, that will continue as standard rent up to 23.6.1978 till the plaintiffs filed the suit for fixation of standard rent. From 23.6.1978, the standard rent of the suit premises as per the amended Section 6 of the Act of 1950, shall be Rs.100/- per month. In view of the judgment of this Court delivered in the case of Brij Mohan (supra) and due to declaration of sub-section (2) of Section 6 of the Act of 1950 ultra vires by the Division Bench from 30.3.1999, the plaintiffs can claim more rent which he could not claim because of the bar of law at the relevant time and the rent if calculated by applying the principle of Brij Mohan's case (supra), then the rent could be Rs. 1200/-per month from the year 2002. But looking to the condition of the shop, this Court deems it proper that

the rent of Rs.1000/- shall be appropriate and that too from the date of decree passed by this Court.

In view of the above reasons, the appeal of the appellants is partly allowed. So far as decree for eviction is concerned, that is denied. The order of the first appellate court is modified and it is held that the standard rent of the suit premises from 8.7.1975 till 30.5.1978 shall be Rs.37.50/- per month. The standard rent from the date of decree shall be Rs.1000/- per month. No order as to costs. The respondents are directed to pay the arrears to the landlords by demand draft or may deposit the amount in the Bank account of the appellants, provided the appellants give complete particulars of their Bank accounts in writing to the respondent-tenants or respondents' counsel, within a period of three months from today.

(**PRAKASH TATIA),J.**

mlt.